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7 DONNA BERONIA,
8 Plaintiff,
9 v.
10 SOUTHWEST AIRLINES CO.,
11 Defendant.

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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

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7 Case No. 22-cv-06699-AMO

8
9 **ORDER GRANTING MOTION TO**
DISMISS

10 Re: Dkt. No. 6

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12 This is an employment case. Before the Court is Defendant Southwest Airlines Co.'s
13 ("Southwest") motion to dismiss. The matter is fully briefed and suitable for decision without oral
14 argument. *See Civil L.R. 7-6.* Having read the parties' papers and carefully considered their
15 arguments and the relevant legal authority, the Court hereby **GRANTS** Southwest's Motion for
16 the following reasons.

17
18 **BACKGROUND**

19 Southwest employed Plaintiff Donna Beronia as an Operations Agent for Southwest at San
20 Jose Mineta Airport from August 24, 2015, until her termination on April 1, 2020. Compl. (ECF
21 1) ¶¶ 7, 18.¹ On August 3, 2018, a co-worker assaulted Beronia at a company picnic in Gilroy,
22 California. Compl. ¶ 8. Southwest suspended Beronia without pay following the assault for
23 "fighting in the workplace," but Southwest reinstated her a month later after she filed a grievance
24 through her union. Compl. ¶¶ 9-10. In the months that followed, Beronia received several
25 reprimands and disciplinary actions for her work, which led to her termination. Compl. ¶ 11-15.

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27 _____
28 ¹ To properly assess the motions to dismiss, the Court accepts as true and draws from the
allegations in the Complaint. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025,
1031 (9th Cir. 2008).

1 Beronia again filed a grievance through her union, which led to her reinstatement. Compl. ¶ 16.
2 Upon reinstatement, Beronia received further reprimands and disciplinary actions. Compl. ¶¶ 16-
3 17.

4 On March 11, 2020, Southwest randomly drug tested Beronia, which is required under
5 federal rules and regulations applicable to airline employees working in safety-sensitive positions.
6 Compl. ¶ 18; 49 U.S.C. § 45102(a); 49 C.F.R. part 40 and 14 C.F.R. part 120. Southwest
7 terminated her after the test results came back positive for cocaine. Compl. ¶ 18.

8 Beronia initiated this lawsuit against Southwest in the Superior Court of the State of
9 California for the County of Santa Clara on October 1, 2020, but she did not serve the complaint
10 on Southwest until September 29, 2022. *See* ECF 1. Southwest removed the case to the U.S.
11 District Court on October 31, 2022. Beronia advances the following causes of action in the
12 Complaint: (1) wrongful termination in violation of public policy, (2) negligent infliction of
13 emotional distress, (3) intentional infliction of emotional distress, and (4) retaliation for engaging
14 in protected activity.

DISCUSSION

16 Southwest moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Complaint
17 for failure to state a claim. After setting forth the legal standard for its consideration of such a
18 motion, the Court considers the sufficiency of the pleading regarding each of Beronia's causes of
19 action.

A. Legal Standard

21 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal
22 sufficiency of the claims alleged in the complaint. *Iletu v. Glock*, 349 F.3d 1191, 1199-1200 (9th
23 Cir. 2003). Under Federal Rule of Civil Procedure 8, which requires that a complaint include a
24 "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ.
25 P. 8(a)(2), a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to state a
26 cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory.
27 *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

28 While the court is to accept as true all the factual allegations in the complaint, legally

conclusory statements, not supported by actual factual allegations, need not be accepted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). The complaint must proffer sufficient facts to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 558-59 (2007) (citations and quotations omitted). A claim is facially plausible when the “plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – that the pleader is entitled to relief.” *Id.* at 679.

B. Analysis

Beronia alleges four causes of action against Southwest: (1) wrongful termination in violation of public policy; (2) negligent infliction of emotional distress (“NIED”); (3) intentional infliction of emotional distress (“IIED”); and (4) retaliation. The Court analyzes the sufficiency of Beronia’s claims in turn.

1. Wrongful Termination in Violation of Public Policy

To establish a claim for wrongful termination in violation of public policy, a plaintiff must show: (1) an employer-employee relationship; (2) she was terminated (or suffered some other adverse action); (3) the termination violated a public policy (a “nexus” exists between the termination and the employee’s protected activity); (4) the termination was the legal cause of the plaintiff’s damages; and (5) the nature and extent of the damages. *Holmes v. General Dynamics Corp.*, 17 Cal. App. 4th 1418, 1426 (1993). California courts have held that vague charges of illegal activities “unaccompanied by citations to specific statutes or constitutional provisions” do not support wrongful termination claims. *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 1257 (1994). Such charges are insufficient because they put the defendant and the court “in the position of having to guess at the nature of the public policies involved, if any.” *Id.* at 1257; *Esberg v. Union Oil Co.*, 28 Cal. 4th 262, 271 (2002) (concluding that employers must have adequate notice of the conduct that will subject them to tort liability for wrongful discharge). It is the plaintiff’s burden to provide the specific statutes and regulations on which the wrongful termination claim is based. *Green v. Ralee Eng. Co.*, 19 Cal. 4th 66, 84 (1998).

1 Beronia contends that Southwest terminated her in “violation of various fundamental
2 public policies underlying both state and federal law” including “Article 1, Section 8 of the
3 California Constitution.” Compl. ¶ 20. This section of the California Constitution holds that “a
4 person may not be disqualified from entering or pursuing a business, profession, vocation, or
5 employment because of sex, race, creed, color, or national or ethnic origin.” Cal. Const. Art. 1,
6 § 8; *see also Phillips v. St. Mary Regional Medical Center*, 96 Cal. App. 4th 218 (2002). The
7 Complaint, however, contains no factual allegations to suggest that the decision to terminate
8 Plaintiff was motivated by her membership in any protected class. Beronia has failed to allege
9 that she was subjected to racist or sexist comments or conduct by anyone at Southwest. Because
10 Beronia’s allegations are insufficient to invoke the California Constitution, and because there is no
11 other statutory basis asserted, the Court finds Beronia’s claim too vague to state a claim for
12 wrongful termination in violation of public policy. However, because Beronia presents several
13 policy grounds under which she intends to proceed if granted leave to amend, the Court will grant
14 leave to amend. In any amended complaint, Beronia shall specify all the legal bases underlying
15 this claim.

16 **2. Negligent Infliction of Emotional Distress**

17 “The law of negligent infliction of emotional distress in California is typically analyzed . . .
18 by reference to two ‘theories’ of recovery: the ‘bystander’ theory and the ‘direct victim’ theory.”
19 *Burgess v. Superior Court*, 2 Cal. 4th 1064, 1071 (1992). “The distinction between the
20 ‘bystander’ and ‘direct victim’ cases is found in the source of the duty owed by the defendant to
21 the plaintiff.” *Id.* at 1272. “Bystander” cases are those in which the plaintiff’s claim of emotional
22 distress “is premised upon a defendant’s violation of a duty not to negligently cause emotional
23 distress to people who observe conduct which causes harm to another.” *Id.* “‘Direct victim’ cases
24 are cases in which the plaintiff’s claim of emotional distress is not based upon witnessing an
25 injury to someone else, but rather is based upon the violation of a duty owed directly to the
26 plaintiff.” *Ragland v. U.S. Bank Nat’l Assn.*, 209 Cal. App. 4th 182, 205 (2012) (citation and
27 internal quotation marks omitted).

28 Beronia does not specify the theory under which she brings her claim for NIED, but the

1 argument presented in her opposition brief suggests that she proceeds under a direct victim theory
2 for tortious conduct done to her. See Opp. Br. at 5-6. “In its decisions addressing the direct
3 victim theory, the California Supreme Court has emphasized that there is no independent tort of
4 negligent infliction of emotional distress.” *Gu v. BMW of N. Am., LLC*, 132 Cal. App. 4th 195,
5 204 (2005) (quotations omitted, collecting cases). Instead, “the tort is negligence, a cause of
6 action in which duty to the plaintiff is an essential element.” *Id.* (quoting *Potter v. Firestone Tire*
7 & Rubber Co.

8 & Rubber Co.

8 “[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of
9 the plaintiff is an object, recovery is available only if the emotional distress arises out of the
10 defendant’s breach of some other legal duty and the emotional distress is proximately caused by
11 that breach of duty.” *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 961 (9th Cir. 2013) (quoting
12 *Potter*, 6 Cal. 4th at 985). Courts have rejected NIED claims resulting from employment
13 terminations because “an employer’s supervisory conduct is inherently intentional,” not negligent.
14 *Semore v. Pool*, 217 Cal. App. 3d 1087, 1105 (1990). Courts reason that an employer’s
15 supervisory conduct, including terminations, are intentional decisions that do not support an NIED
16 claim. *Edwards v. United States Fid. & Guaranty Co.*, 848 F. Supp. 1460, 1466 (N.D. Cal. 1994);
17 see also *Semore*, 217 Cal. App. 3d at 1105.

18 Here, Beronia fails to allege negligence because she only complains of intentional
19 supervisory conduct, including warnings issued to her and consideration of her grievances.
20 Beronia’s termination cannot support a claim for negligence because Southwest intentionally
21 terminated her following her failed drug test, which Beronia does not dispute. Compl. ¶ 18.
22 Further, Beronia fails to identify the duty owed to her by Southwest and accordingly fails to allege
23 negligent conduct on the part of Southwest.

24 Beronia argues that she states a claim for both IIED and NIED but fails to acknowledge the
25 distinct pleading standards for the two claims. See Opp. Br. at 8-9 (citing *Onelum v. Best Buy*
26 *Stores L.P.*, 948 F. Supp. 2d 1048, 1050 (C.D. Cal. 2013)). Beronia’s reliance on *Onelum* fails,
27 moreover, because that case did not involve a claim for NIED or negligence. *Onelum* only
28 involved a claim for IIED, and therefore does not support the sufficiency of her pleading for

1 NIED. In sum, the Court must dismiss Beronia's cause of action for NIED.

2 **3. Intentional Infliction of Emotional Distress**

3 Southwest challenges Beronia's cause of action for intentional infliction of emotional
4 distress on two bases: (a) the insufficiency of Beronia's pleading and (b) the California Worker's
5 Compensation Exclusivity bar for damages arising from the employment relationship. The Court
6 addresses these two grounds for dismissal of the claim in turn.

7 **a. Sufficiency of Pleading IIED**

8 To state a prima facie claim for IIED, a plaintiff must allege the following elements:
9 “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless
10 disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or
11 extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the
12 defendant's outrageous conduct.” *Christensen v. Superior Ct.*, 54 Cal. 3d 868, 903 (1991). The
13 first element requires a significant showing: “[a] defendant's conduct is ‘outrageous’ when it is so
14 extreme as to exceed all bounds of that usually tolerated in a civilized community.” *Hughes v.*
15 *Pair*, 46 Cal. 4th 1035, 1050-51 (2009) (quotation marks and citation omitted). A plaintiff must
16 plausibly allege that the defendant's conduct was intended to inflict injury or that the defendant
17 engaged in the conduct with the realization injury would result. *Id.* at 1051. Claims of IIED based
18 on employment-based conduct often falls short of this standard; for example, firing an employee
19 by itself does not constitute “outrageous” conduct, even if the firing was without cause. *Buscemi*
20 *v. McDonnell Douglas Corp.*, 736 F.2d 1348, 1352 (9th Cir. 1984). Likewise, discipline and
21 criticism that are a normal part of the employment relationship do not constitute “outrageous
22 conduct, even if intentional and malicious.” *Lawler v. Montblanc North America, LLC*, 704 F.3d
23 1235, 1245-46 (9th Cir. 2013).

24 Here, Beronia's allegations consist solely of complaints regarding personnel decisions,
25 which are insufficient to support the first element of her prima facie case, extreme and outrageous
26 conduct by Southwest. Compl. ¶¶ 9-17; *Janken v. GM Hughes Elec.*, 46 Cal. App. 4th 55, 64-65
27 (1996) (“commonly necessary personnel management actions” do not rise to the level of “extreme
28 and outrageous” as a matter of law). Further, Southwest's termination of Beronia for testing

1 positive for cocaine complied with federal regulations applicable to her position. 49 C.F.R. part
2 40; 14 C.F.R. part 120. Beronia does not and cannot establish that her termination for cause in
3 accordance with federal regulations constituted outrageous conduct. Given the absence of any
4 facts showing outrageous conduct by Southwest, the Court must also dismiss Beronia's cause of
5 action for IIED.

6 Beronia argues that the California Supreme Court's opinion in *Alcorn v. Anbro*
7 *Engineering, Inc.*, 2 Cal. 3d 493 (1970), supports her claim for IIED. Not so. The *Alcorn* court
8 held that a reasonable finder of fact could find extreme and outrageous conduct where the
9 plaintiff's supervisor yelled at him using racial slurs immediately before terminating him. *Id.* at
10 496-97. In contrast to such overt discrimination, Beronia complains of a 2018 physical assault by
11 a co-worker at an offsite event that is attenuated from her ultimate termination by multiple
12 terminations and re-hirings in the intervening years. Compl. ¶¶ 9-17. Such conduct by Southwest
13 does not reach the level of extreme and outrageous.

14 **b. California Worker's Compensation Exclusivity Bar**

15 Beyond the insufficiency of Beronia's factual allegations, her IIED claim is also barred by
16 California's Worker's Compensation Exclusivity. California Labor Code section 3600(a) makes
17 the worker's compensation system the sole remedy "for any injury sustained by . . . employees
18 arising out of and in the course of the employment." Courts have found, based on this sole
19 remedy, that a plaintiff cannot bring a common law IIED claim for "ordinary employer conduct
20 that intentionally, knowingly or recklessly harms an employee." *Fermino v. Fedco, Inc.*, 7 Cal.
21 4th 701, 714 (1994). "That limitation does not apply, however, when the 'injury is a result of
22 conduct, whether in the form of discharge or otherwise, not seen as reasonably coming within the
23 compensation bargain.'" *Kovatch v. Cal. Cas. Mgmt. Co.*, 65 Cal. App. 4th 1256, 1277 (1998).
24 Said differently, California courts have held that that the Worker's Compensation Act bars IIED
25 claims except where the employer's conduct contravenes fundamental public policy or where the
26 employer's conduct falls outside the normal risks of the employment relationship. *Light v. Dep't*
27 *of Parks & Recreation*, 14 Cal. App. 5th 75, 97 (2017); *see also Livitsanos v. Superior Court*, 2
28 Cal. 4th 744, 754-55 (1992) (if "the employer's conduct neither contravenes fundamental public

1 policy nor exceeds the inherent risks of the employment,” it is not actionable in a civil suit).

2 First, as discussed above, Beronia fails to identify how Southwest’s conduct contravenes
3 fundamental public policy. Southwest’s termination of Beronia following her positive drug test
4 generally comports with public policy because the termination resulted from the airline’s
5 compliance with federal regulations. *See* 49 C.F.R. part 40; 14 C.F.R. part 120. While she
6 contends in her opposition brief that Southwest engaged in discriminatory conduct, which would
7 contravene public policy, Beronia does not identify any instance in which Southwest treated her
8 differently based on her membership in a protected class. *See* Compl. ¶ 20; *cf. Light*, 14 Cal. App.
9 5th at 97 (discussing how discriminatory practices fall outside worker’s compensation
10 exclusivity). For the same reasons that Beronia cannot state a claim for wrongful termination in
11 violation of public policy, discussed above, she cannot establish that her IIED claim falls within
12 the public policy exception to the exclusivity requirements of the worker’s compensation scheme.

13 Second, Beronia has not alleged conduct on the part of Southwest that falls outside the
14 normal bounds of employment. “Emotional distress caused by misconduct in employment
15 relations involving, for example, promotions, demotions, criticism of work practices, negotiations
16 as to grievances, is a normal part of the employment environment.” *Light*, 14 Cal. App. 5th at 98
17 (quotation marks and citation omitted). Beronia complains about Southwest’s criticism of her job
18 performance, discipline for purported errors, and treatment of her grievances, but these fall within
19 the normal bounds of the employment relationship. Compl. ¶¶ 10-18. On this basis as well,
20 Beronia fails to establish that her IIED claim falls within an exception to the exclusivity
21 requirements of the worker’s compensation scheme.

22 In sum, Beronia’s IIED claim must be dismissed because the allegations of Southwest’s
23 conduct between 2018 and 2020 constitute personnel management actions that fall well short of
24 the standard for extreme and outrageous conduct. Further, Beronia’s IIED claim must be
25 dismissed because it is barred by the exclusive remedy provisions of California’s worker’s
26 compensation scheme.

27 **4. Retaliation**

28 Beronia alleges that Southwest retaliated against her for engaging in her union’s grievance

1 process and for discussing union rights with her co-workers, but she does not specify the legal
2 basis for her retaliation claim in her Complaint. Compl. ¶¶ 35-39 (describing Beronia's fourth
3 cause of action of "retaliation for engaging in protected activity" without reference to a statutory
4 or common law basis for such a claim). Beronia then argues in opposition to Southwest's Motion
5 that her claim for retaliation relies on the policy embedded in California's Fair Employment and
6 Housing Act ("FEHA"). *See* Opp. Br. at 12 (citing Cal. Govt. Code § 12940 et seq.). In so
7 arguing, Beronia improperly seeks to amend the Complaint through her opposition brief. *See*
8 *Diamond S.J. Enter., Inc. v. City of San Jose*, 395 F. Supp. 3d 1202, 1231 (N.D. Cal. 2019) ("the
9 complaint may not be amended by briefs in opposition to a motion to dismiss."). Nonetheless,
10 because Beronia is entitled to a liberal construction of her pleadings, the Court examines her
11 retaliation claim as if brought under FEHA.².

12 Construed as a FEHA retaliation claim, Beronia's claim fails for lack of administrative
13 exhaustion. Beronia fails to allege any facts showing that she filed a timely charge and received a
14 right-to-sue notice from the Department of Fair Employment and Housing or the U.S. Equal
15 Employment Opportunity Commission for her retaliation claim before initiating this lawsuit. *See*
16 *Holland v. Union Pac. R.R. Co.*, 154 Cal. App. 4th 940, 945 (2007); *Jasch v. Potter*, 302 F.3d
17 1092, 1094 (9th Cir. 2002). Indeed, Beronia acknowledges that she did not administratively
18 exhaust her retaliation claim – her opposition brief concedes that she does not intend to proceed
19 with retaliation as a separate cause of action. Opp. Br. at 11-13. She argues instead that
20 Southwest violated the public policy embedded in FEHA's retaliation provision, and it is the
21 violation of this policy that gives rise to her claim for wrongful termination in violation of public
22 policy. *Id.* While Beronia may be correct that she need not exhaust administrative remedies for
23 retaliation if she proceeds on a cause of action for wrongful termination in violation of public
24

25 ² Beronia's Complaint additionally suggests without clearly stating that she intends to pursue a
26 claim for retaliation under the National Labor Relations Act ("NLRA") based on her union-based
27 activity. Compl. ¶¶ 35-36. Employees seeking to vindicate their collective bargaining rights in
28 federal court must bring a hybrid action alleging that the employer breached the agreement and
that the union breached its duty of fair representation, and such action must be filed within six
months of the conclusion of the contractual grievance process. *See Farr v. Pac. Gas & Elec. Co.*,
No. 21-CV-08099-JSW, 2022 WL 1188866, at *3 (N.D. Cal. Apr. 21, 2022). Given the facts
pledged and the parties involved, Beronia may not pursue a claim for retaliation under the NLRA.

1 policy, *Stevenson v. Superior Ct.*, 16 Cal. 4th 880, 904-05 (1997), she cannot state a claim for
2 retaliation under FEHA without administrative exhaustion. The Court must therefore dismiss the
3 retaliation claim with prejudice.

4 **CONCLUSION**

5 For the foregoing reasons, the Court GRANTS Southwest's motion to dismiss the
6 Complaint. Beronia may file an amended complaint within 30 days from the date of this order.
7 Beronia may not amend her retaliation cause of action, as it is DISMISSED WITH PREJUDICE.
8 No new claims or parties may added without consent of Defendant or leave of court.

9 **IT IS SO ORDERED.**

10 Dated: March 19, 2024

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United States District Court
Northern District of California


ARACELI MARTÍNEZ-OLGUÍN
United States District Judge